No. 93-783

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

EDWIN T. SHIMODA, *Administrator, Oahu Community Correctional Center,*

Petitioner,

vs.

RONALD S. BURGO, MELVIN KAUHANE, *Sergeant, Oahu Community Correctional Center,* and HAROLD FALK, *Director, Department of Corrections,*

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY MEMORANDUM

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ARGUMENT

I. Respondent's Total Failure to Address the Pendency of *Farmer v. Brennan*, No. 92-7247 (U.S. argued Jan. 12, 1994), as Well as the Undisputed Facts Relating to Petitioner Shimoda's Conduct in the Present Case, Virtually Confesses that the Ninth Circuit's Judgment Rejecting Immunity Should Be Summarily Reversed, or, at a Minimum, that this Court Should Grant Certiorari.

As this Court held only days ago in its decision in *Elder v. Holloway*, No. 92-8579 (U.S. Feb. 23, 1994), the

lower courts are bound "to consider, in light of *all* relevant authority . . . , whether [state officials] are entitled to prevail on their qualified immunity defense." *Id.*, Slip Op. at 6 (emphasis added). It goes without saying that the *most* "relevant authority" bearing on the issue of qualified immunity, *i.e.*, the issue whether one or more questions of federal law material to a plaintiff's affirmative claim under 42 U.S.C. § 1983 "w[ere] open at the time [the official] acted," *Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985), is a decision of *this* Court signifying there is a "legitimate question," *id.*, over the scope of material federal right. *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam).

Such a precedent is exactly what is present in this case, for as Petitioner has argued, the very grant of review in *Farmer v. Brennan*, No. 92-7247 (U.S. argued Jan. 12, 1994), indicates a substantial division in the courts of appeals over the circumstances under which high-level prison officials can be held responsible under the Eighth Amendment for violent actions committed by third parties within a prison setting. *See* Pet. at 27. Indeed, regardless whether the prison officials win or lose the merits issues at stake in *Farmer*, the conflicts in the circuits which have engendered this Court's decision to review the Seventh Circuit's Eighth Amendment analysis in *Farmer* absolutely compel reversal of the Ninth Circuit's denial of immunity here.

Respondent asserts "petitioner's inaction despite knowledge of ACO Kauhane's continued contact with prisoners, clearly exposed each inmate who came in contact with ACO Kauhane to serious risk." Resp. Br. at 3. But this ignores the undisputed facts that Petitioner

Shimoda (a) had promulgated extensive policies prohibiting the use of "excessive force"; (b) established a practice of placing guards accused of physical misconduct into "no-contact" positions, and saw to it that correctional officer Kauhane was indeed *ordered* into such a position; (c) saw to it that incidents involving Kauhane were investigated, first, by sending the matter to the Department's internal affairs office (over which Shimoda had no control), and then by a referral to Shimoda's own investigative staff; and (d) directed follow-up from his own staff investigators when it appeared to Shimoda that the second investigation was taking too long. *See* Pet. at 2-9, 27. For his part, Respondent Burgo does not refute any of this, and even admits that the incident which assertedly placed Petitioner "on notice" consisted of nothing more than correctional officer Kauhane's alleged " 'scuffle' with an inmate." Resp. Br. at 2.

As the Solicitor General argued recently in *Farmer:*

> [T]he threat of assault by another inmate is not like the risk of a static prison condition. Compare *Helling v. McKinney, supra* (addressing the risk of second-hand or "passive" smoke). Inmate violence is often random and unpredictable, and may depend on the temporary presence of particularly violent individuals. Such violence can never been fully controlled, despite prison officials' best efforts. See *e.g., Bruscino v. Carlson,* 854 F.2d 162 (7th Cir. 1988) (detailing inmate violence at USP-Marion), *cert. denied,* 491 U.S. 907 (1989). Because day-to-day life in prisons housing violent offenders exposes inmates to a possibility of violence that may be present despite reasonable measures on the part of prison officials to ensure security, the risk of

> inmate assaults that is inevitably present in such facilities is not sufficient to satisfy the objective component of the Eighth Amendment. Rather, to be actionable, the risk of inmate assaults must rise significantly above the level that is ordinarily prevalent in facilities housing dangerous offenders. The level of risk to which the complaining inmate is exposed must "be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk." *Helling*, 113 S. Ct. at 2482. Such a risk of violence is not ordinarily shown by pointing to isolated incidents [.]

Br. For Respondents at 12-13, No. 92-7247. In turn, even under the "deliberate indifference" standard, "the prison official must know of the risk of harm to which an inmate is exposed, or he must actively avoid such knowledge," "and he must fail to take readily available action to prevent the harm from occurring." *Id.* at 16. Translated to the context of managing civil correctional employees who are presumed innocent, who enjoy substantial Due Process and contractual rights vis a vis their job status, who, under this Court's decisions (*see Hudson v. McMillian*, 112 S. Ct. 995 (1992); *Whitley v. Albers*, 475 U.S. 312 (1986)), have substantial discretion, for Eighth Amendment purposes, to use force within the prison setting, and where the "facts" supposedly alerting the prison official to the "risks" at issue are, in significant regard, accusations by convicted felons, these arguments show that the Ninth Circuit was wrong to deny immunity here, *regardless* of how *Farmer* is decided.

II. As Demonstrated by this Curt's Decisions in *Elder v. Holloway*, No. 92-8579 (U.S. Feb. 23, 1994), and *Caspari v. Bohlen*, No. 92-1500 (U.S. Feb. 23, 1994), Respondent's Argument that Post-Act Precedent Cannot Be Relevant to Qualified Immunity Analysis Confirms that the Ninth Circuit's Judgment Undermines this Court's Authoritive Position as Final Arbiter of the Federal Constitution, is Contrary to *Harper v. Virginia Department of Taxation*, 113 S. Ct. 2510 (1993), and Disregards Qualified Immunity Analysis.

Respondent boldly argues that "[t]he law is a dynamic entity and constantly evolving with time," Resp. Br. at 5, and for that reason, neither the grant of certiorari in *Farmer* (nor anything this Court might say there on the *merits* of Respondent's claim against Administrator Shimoda), nor the substantial clarification of Eighth Amendment doctrine in such decisions as *Wilson v. Seiter*, 111 S. Ct. 2321 (1991), *Hudson v. McMillian*, 112 S. Ct. 995 (1992), and *Helling v. McKinney*, 113 S. Ct. 2475 (1993), can be relevant to Petitioner's qualified immunity.

This reasoning completely inverts qualified immunity analysis. As this Court held in *Elder*, a court of appeals must consider "*all* relevant authority" in determining whether a state official is entitled to qualified immunity. Respondent's position, taken seriously, means that the courts of appeals are essentially powerless to consider the most critical and persuasive "authority" of all: a decision by *this* Court that the lower federal courts are divided on a material question of federal law, or that there is an "important question of federal law which has not been, but should be, settled by this Court." S. Ct. R. 10.1. Indeed, as this Court ruled the same day it decided

Elder, recent precedent, handed down after the relevant decision-makers have acted, can be quite "relevant" to immunity analysis, either by making clear that a material issue of federal law remains open, or by acknowledging a conflict and then resolving it. *See Caspari v. Bohlen*, Slip Op. at 8, No. 92-1500 (U.S. Feb. 23, 1994) (states' immunity from federal habeas corpus reversals under *Teague v. Lane*, 489 U.S. 288 (1989)). The Ninth Circuit's refusal to consider *any* legal development occurring after the acts and omissions for which Burgo is suing took place is plainly contrary to this precedent, and flouts the decision of this Court in *Harper v. Virginia Department of Taxation*, 113 S. Ct. 2510 (1993). Certainly, if, as we argue, and, as *Harper* dictates, a new precedent means that Burgo's federal rights were not violated "at all," *Siegert v. Gilley*, 111 S. Ct. 1789, 1793 (1991), then this Court's treatment of basic issues underlying inmate Burgo's affirmative case must be part of the "relevant precedents," *Elder, supra*, bearing on immunity.

While Respondent labors to show that there was "a violation of Burgo's constitutional right [to be free] from the use of excessive force by ACO Kauhane," Resp. Br. at 4, *this* case is not about whether ACO Kauhane is liable to Respondent. *This* case concerns whether, on the record here, Administrator Shimoda was " 'plainly incompetent' " or " 'knowingly violated the law.' " *Burns v. Reed*, 111 S. Ct. 1934, 1944 (1991). In addition to ignoring the grant of review in *Farmer, supra*, Burgo does not deny that the decisions in *Seiter, Hudson*, and *Helling, if* part of the "relevant precedent" which the Ninth Circuit was bound to consider, require reversal of the judgment here. Instead, Burgo's main argument is that his asserted "rights" to collect damages from Mr. Shimoda cannot be "extinguished" (Resp. Br. at 5) by a decision of this Court. This cannot be the law.

CONCLUSION

For the reasons above, and those stated in the Petition, the Petition for Certiorari should be granted. Because the court of appeals did not have the benefit of this Court's decisions in *Harper v. Virginia Department of Taxation*, 113 S. Ct. 2510 (1993), *Helling v. McKinney*, 113 S. Ct. 2475 (1993), and *Elder v. Holloway*, No. 92-8579 (U.S. Feb. 24, 1994), the Court may wish to grant the petition, vacate the judgment, and remand for further consideration in light of those decisions. The Court may also wish to grant the petition, vacate the judgment, and remand for further consideration in light of the grant of certiorari in *Farmer v. Brennan*, No. 92-7247 (U.S. cert. granted Oct. 4, 1993), or to hold this case pending decision in *Farmer*.

Dated: Honolulu, Hawaii, February 25, 1994.

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